Supreme Court, U.S.
FILED
NOV 24 1986
JOSEPH F. SPANIOL, JR.
CLERK

(2)

Nos. 85-2028 and 85-7100

In the Supreme Court of the United States

OCTOBER TERM, 1986

DANTE GILL, a/k/a TEX GILL, PETITIONER

v.

UNITED STATES OF AMERICA

CYNTHIA T. BRUNO, a/k/a CYNTHIA GILL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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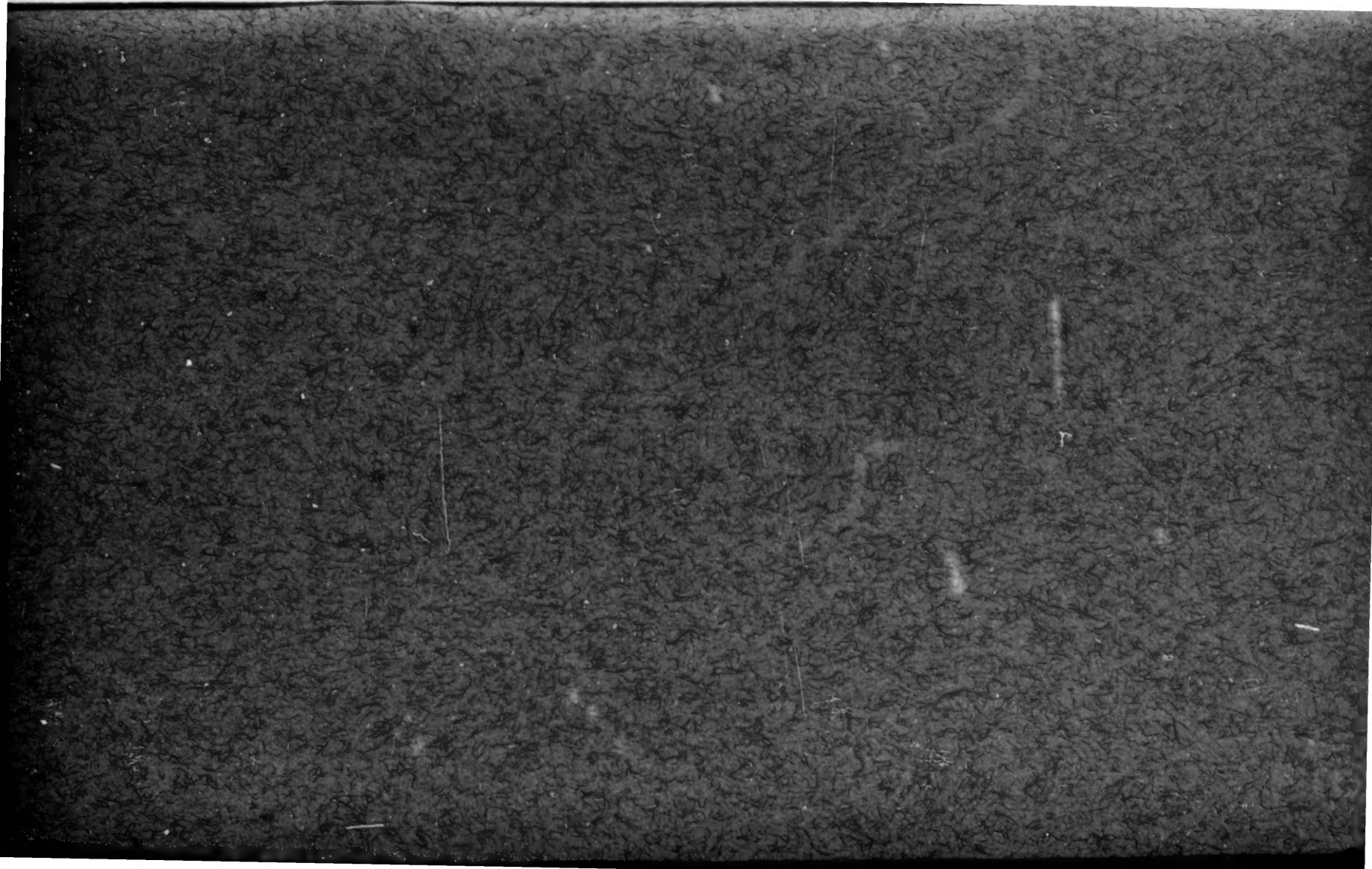

QUESTIONS PRESENTED

1. Whether petitioners' convictions should be reversed and the indictment against them dismissed because the district court permitted the government to depose a witness who had been granted immunity in lieu of having the witness appear before the grand jury.

2. Whether the prosecutor improperly granted informal immunity to various witnesses who appeared before the grand jury.

3. Whether the district court abused its discretion in permitting lay opinion testimony on the probable amount of gross income generated from petitioners' operation of various massage parlors.

4. Whether documents seized from petitioner Gill's home should have been suppressed as the fruits of an illegal search and seizure.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	2
Argument	4
Conclusion	13

TABLE OF AUTHORITIES

Cases:

Bowman v. *United States*, 350 F.2d 913, cert. denied, 383 U.S. 950	7
Elkins v. *United States*, 364 U.S. 206	12
Grand Jury Investigation (New Jersey State Commission of Investigation), In re, 630 F.2d 996, cert. denied, 449 U.S. 1081	5
Joy Mfg. Co. v. *Sola Basic Industries, Inc.*, 697 F.2d 104	8-9
Massachusetts v. *Sheppard*, 468 U.S. 981	11
Michigan v. *Tyler*, 436 U.S. 499	12
Sealed Case, In re, 801 F.2d 1379	5
Special March 1981 Grand Jury, In re, 753 F.2d 575	5
Texas v. *Brown*, 460 U.S. 730	11
United States v. *Anderson*, 577 F. Supp. 223, rev'd, 778 F.2d 602	7-8
United States v. *Doe*, 465 U.S. 605	8
United States v. *Interstate Dress Carriers, Inc.*, 280 F.2d 52	5
United States v. *Kilpatrick*, 575 F. Supp. 325	8
United States v. *La Pera*, 443 F.2d 810, cert. denied, 404 U.S. 958	7
United States v. *Leon*, 468 U.S. 897	11
United States v. *Mandel*, 591 F.2d 1347, on reh'g, 602 F.2d 653, cert. denied, 445 U.S. 961	9

Cases—Continued: Page

United States v. *Mechanik*, No. 84-1640 (Feb. 25, 1986) 5, 6
United States v. *Samango*, 607 F.2d 877 6
United States v. *Shaffner*, 524 F.2d 1021, cert. denied, 424 U.S. 920 7
United States v. *Skolek*, 474 F.2d 582 7
United States v. *Wertz*, 625 F.2d 1128, cert. denied, 449 U.S. 904 12
United States v. *Wilson*, 601 F.2d 95 10
United States v. *Winter*, 663 F.2d 1120, cert. denied, 460 U.S. 1011 8

Constitution, statutes and rules:

U.S. Const. Amend. V 4, 7
18 U.S.C. 371 2
18 U.S.C. 6002 ..... 4, 7, 8
18 U.S.C. 6003 ..... 4, 8
26 U.S.C. 7206 10
26 U.S.C. 7206(1) 2
26 U.S.C. 7206(2) 2
Fed. R. Crim. P.:
Rule 6(d) 6
Rule 6(e) 5
Fed. R. Evid.:
Rule 701 8
Rule 801(d)(2)(E) 8, 9

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-2028

DANTE GILL, a/k/a TEX GILL, PETITIONER

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UNITED STATES OF AMERICA

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A26)[1] is unreported.

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[1] Unless otherwise noted, "Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 85-2028. "J.A." and "S.A." refer respectively to the joint appendix and the supplemental appendix filed in the court of appeals.

JURISDICTION

The judgment of the court of appeals was entered on April 9, 1986. A petition for rehearing filed by petitioner Dante Gill was denied on May 6, 1986 (Pet. App. A27-A28). The petition for a writ of certiorari in No. 85-2028 was filed on June 10, 1986, and the petition in No. 85-7100 was filed on June 12, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Following a jury trial in the United States District Court for the Western District of Pennsylvania, petitioners Dante Gill and Cynthia Bruno were convicted of conspiracy to defraud the United States by impeding, impairing, obstructing, and defeating the collection of taxes, in violation of 18 U.S.C. 371 (Count 1). Gill was also convicted on three counts of aiding and assisting in the preparation and presentation of false corporate income tax returns, in violation of 26 U.S.C. 7206(2) (Counts 3, 5 and 8) and on one count of knowingly making and subscribing a false corporate income tax return, in violation of 26 U.S.C. 7206(1) (Count 9).[2] Gill was sentenced to a five-year term of imprisonment and fined $10,000 on Count 1, andshe was sentenced to a consecutive two-year term of imprisonment and fined $5,000 on Count 3. On Counts 5 and 8, Gill was sentenced to consecutive three-year terms of imprisonment and fined $5,000. On the meeting of certain conditions, however, the sentences of imprisonment on

[2] Co-defendant Raymond Oshop was also convicted on the conspiracy count (18 U.S.C. 371) and on two counts of aiding and assisting in the filing of false corporate income tax returns (26 U.S.C. 7206(2)).

those two counts were to be suspended and Gill was to be placed on probation for five years. On Count 9, Gill was sentenced to three years' imprisonment and fined $5,000. Execution of sentence on that count was suspended, and Gill was placed on probation for five years. Bruno was sentenced to two years' imprisonment, all but three months of which was suspended, to be followed by five years' probation. I J.A. 18a-19a. The court of appeals affirmed (Pet. App. A1-A26).

2. The evidence at trial established that from 1975 through 1983, Gill owned and operated a chain of massage parlors in the Pittsburgh area that were "covers" for prostitution activities (Pet. App. A3). Although the parlors earned more than a million dollars a year, Gill, with the assistance of co-defendant Oshop, a certified public accountant, prepared and filed corporate income tax returns that reported only a fraction of that yearly income (S.A. 164-166, 344). In addition, to ensure the success of their scheme to defraud the United States, Gill, with the assistance of Bruno, operated the parlors in a manner designed to conceal that income from the Internal Revenue Service (IRS).

3. On appeal, petitioners raised numerous claims, all of which were rejected by the court of appeals. Specifically, the court found that various documents seized in the course of the investigation were not the products of an illegal search and seizure, that there was no prosecutorial misconduct in the granting of letter immunity to certain grand jury witnesses, and that the testimony of a lay witness was properly admitted in connection with the tax deficiencies at issue (Pet. App. A5-A7). The court found that only one issue warranted any extended discussion: the claim

that the grand jury process was abused because the district court permitted the government to depose a witness who had been granted immunity instead of requiring that she testify before the grand jury. Although the court condemned the deposition procedure (Pet. App. A17, A25-A26), it found no actual prejudice to petitioners and no flagrant abuse of the grand jury process warranting dismissal of the indictment (*id.* at A16-A26).

ARGUMENT

1. Petitioners (Gill Pet. 6-11; Bruno Pet. 30-32) contend that their convictions should be reversed and the indictment against them dismissed on the ground that the district court erred in permitting the government to depose a witness, who had received a grant of immunity, in lieu of having her appear before the grand jury. That claim is without merit. Without conceding any impropriety, we submit that the court of appeals was correct in ruling (Pet. App. A16) that petitioners suffered no actual prejudice and that the procedure did not constitute a flagrant abuse of the grand jury process.

a. During its investigation, the grand jury issued a subpoena requiring Bonnie Jones, a former employee of petitioner Gill's massage parlors, to testify. Jones appeared before the grand jury and invoked her Fifth Amendment privilege. The government thereafter sought a grant of immunity pursuant to 18 U.S.C. 6002 and 6003. Prior to seeking immunity, however, the government reached an agreement with Jones whereby she would not have to reappear before the grand jury, but instead would be deposed by an Assistant United States Attorney. This procedure benefited Jones because her attorney was able

to attend the questioning, and she was released from the presumably more stressful interrogation before a grand jury (Pet. App. A8-A9, A24). Thereafter, the district court entered an order stating that Jones would not be excused from testifying " 'in deposition or affidavit form to an agent of the IRS or an Assistant United States Attorney, or before a Federal Grand Jury, or at any trials which may result from the Grand Jury's inquiry' " (Pet. App. A9). Following the entry of that order, Jones, accompanied by counsel, was deposed by an Assistant United States Attorney and three IRS special agents.[3] The transcript of her deposition was sealed and eventually read to the grand jury in its entirety. Pet. App. A10.

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[3] During her deposition Jones was shown documents that had been subpoenaed by the grand jury. Bruno asserts (Pet. 31) that this procedure impermissibly undermined the grand jury's secrecy. The court of appeals (Pet. App. A6) correctly rejected that contention; the disclosure of the documents, all of which were business records generated independently of the grand jury investigation, did not violate Fed. R. Crim. P. 6(e). See, *e.g.*, *In re Grand Jury Investigation (New Jersey State Commission of Investigation)*, 630 F.2d 996, 1000 (3d Cir. 1980), cert. denied, 449 U.S. 1081 (1981) (Rule 6(e) was "designed to protect from disclosure only the essence of what takes place in the grand jury room"; since documents have an existence independent of the grand jury proceedings, "[t]he mere fact that a particular document is reviewed by a grand jury does not convert it into a 'matter occurring before the grand jury' within the meaning of 6(e)"); see also *In re Special March 1981 Grand Jury*, 753 F.2d 575, 578 (7th Cir. 1985); *United States* v. *Interstate Dress Carriers, Inc.*, 280 F.2d 52, 54 (2d Cir. 1960); but cf. *In re Sealed Case*, 801 F.2d 1379, 1381 (D.C. Cir. 1986). In any event, even assuming there was error, the petit jury's guilty verdicts rendered any such error harmless. See *United States* v. *Mechanik*, No. 84-1640 (Feb. 25, 1986), slip op. 6-7.

b. The court of appeals correctly found (Pet. App. A20-A21) that petitioners suffered no actual prejudice as a result of the deposition procedure. In particular, the absence of an opportunity for the grand jury to observe Jones's demeanor did not significantly affect its ability to assess probable cause because the complete transcript of Jones's deposition was read to the grand jury and because Jones was not a witness whose credibility was subject to serious question (Pet. App. A21).[4]

Furthermore, assuming *arguendo* that dismissal of the indictment in the absence of actual prejudice would ever be appropriate, particularly after a guilty verdict by a petit jury,[5] such a remedy would not be justified here. The court of appeals found (Pet. App. A22-A25) that there was no abuse of the grand jury process sufficiently flagrant to justify the dismissal

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[4] The court (Pet. App. A18-A21) distinguished the case of *United States* v. *Samango*, 607 F.2d 877 (1979), in which the Ninth Circuit affirmed the district court's dismissal of an indictment that was returned after a transcript of testimony had been submitted to the grand jury in lieu of oral testimony. As the court noted (Pet. App. A18-A21), *Samango* was based on a variety of factors not present here: lengthy transcripts were merely deposited with and not read to the grand jury; the record suggested that some grand jurors may not have been familiar with the contents of the transcripts; and the prosecutor did not warn the grand jury of the witness's doubtful credibility or advise them that they could subpoena him to give live testimony.

[5] In *United States* v. *Mechanik*, No. 84-1640 (Feb. 25, 1986), the Court held that even assuming there was a violation of Fed. R. Crim. P. 6(d) based on the simultaneous presence and testimony of two witnesses before the grand jury, the error was rendered harmless by the petit jury's subsequent guilty verdict. The reasoning of *Mechanik* is equally applicable to this case.

of the indictment. As the court noted (*id.* at A22-A24), the district court, upon formal application from the Assistant United States Attorney, explicitly authorized the taking of a deposition in lieu of Jones's appearance before the grand jury, and that was done only after Jones had appeared before the grand jury and invoked her Fifth Amendment privilege. The court also observed (*id.* at A24) that Jones voluntarily agreed to the deposition procedure and that she derived benefit from it. Finally, the court acknowledged (*id.* at A24-A25) that while the deposition procedure used in the case was not authorized by 18 U.S.C. 6002, the Third Circuit had never previously condemned it; indeed, the court noted that if the grand jury itself had directed that the deposition procedure be utilized, it would have been wholly unobjectionable. In sum, the court correctly concluded that the use of the deposition procedure was not a flagrant abuse of the grand jury process.

2. Petitioners also contend (Gill Pet. 8-9; Bruno Pet. 33-34) that the prosecutor's use of letters granting "informal" immunity to various witnesses who appeared before the grand jury was improper. To begin with, petitioners lack standing to challenge the testimony of the immunized witnesses, even if the use of informal immunity was improper. See, *e.g.*, *United States* v. *Shaffner*, 524 F.2d 1021 (7th Cir. 1975), cert. denied, 424 U.S. 920 (1976); *United States* v. *Skolek*, 474 F.2d 582, 584-585 (10th Cir. 1973); *United States* v. *Le Pera*, 443 F.2d 810, 812 (9th Cir.), cert. denied, 404 U.S. 958 (1971); *Bowman* v. *United States*, 350 F.2d 913, 915-916 (9th Cir. 1965), cert. denied, 383 U.S. 950 (1966). In any event, the courts of appeals have repeatedly upheld the use of informal immunity. See, *e.g.*, *United*

States v. *Anderson*, 778 F.2d 602, 606 (10th Cir. 1985) (citing authority); *United States* v. *Winter*, 663 F.2d 1120, 1133 (1st Cir. 1981), cert. denied, 460 U.S. 1011 (1983).[6] And petitioner has not shown how the use of informal immunity in any way tainted the grand jury. See *Anderson*, 778 F.2d at 606.

3. Petitioners (Gill Pet. 11-16; Bruno Pet. 25-29) also contend that the trial court abused its discretion under Fed. R. Evid. 701 in permitting Jones to give her opinion as to the amount of money generated by the massage parlors. As the court of appeals correctly held, however, that testimony was properly admitted under Fed. R. Evid. 701 and 801(d)(2)(E).

Under Rule 701, opinion testimony by a lay witness is admissible if the opinions or inferences are rationally based on the perceptions of the witness and are helpful to a clear understanding of the testimony or the determination of a fact in issue. See, *e.g.*, *Joy Mfg. Co.* v. *Sola Basic Industries, Inc.*,

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[6] In challenging the use of informal immunity, petitioners rely (Gill Pet. 9; Bruno Pet. 33-34) on *United States* v. *Kilpatrick*, 575 F. Supp. 325 (D. Colo. 1983); *United States* v. *Anderson*, 577 F. Supp. 223 (D. Wyo. 1983), rev'd, 778 F.2d 602 (10th Cir. 1985); and *United States* v. *Doe*, 465 U.S. 605 (1984). *Kilpatrick's* holding on informal immunity and the district court decision in *Anderson* are no longer good law in light of the Tenth Circuit's decision in *Anderson* (778 F.2d at 606) reversing the district court on that issue. This Court's decision in *Doe* is not to the contrary. In that case, the Court was concerned not with informal immunity but with whether a trial judge had authority, other than that provided in 18 U.S.C. 6002 and 6003, to grant immunity and order an unwilling witness to testify or produce documents (465 U.S. at 616). The Court in no way suggested that there was anything improper in the government's giving a witness informal immunity in exchange for his agreement to testify.

697 F.2d 104, 111 (3d Cir. 1982). A trial court's admission of such testimony may be overturned only for a clear abuse of discretion (*ibid.*). No such abuse of discretion occurred here. Jones, who acted as the bookkeeper for the parlors and who was responsible for making up work schedules for the prostitutes and for distributing pay envelopes to them, testified concerning the gross earnings of the massage parlors (IV J.A. 954a-959a, 1020a-1022a, 1094a, 1098a, 1131a). Much of her testimony was based on her own personal knowledge, and those portions of her testimony were clearly admissible. Other portions of her testimony were based on the statements of prostitutes who worked for the parlors. Her opinion was properly based on those statements as well, since those statements were declarations of co-conspirators in furtherance of the conspiracy (Fed. R. Evid. 801(d)(2)(E)) and thus were not hearsay. See generally *United States* v. *Mandel*, 591 F.2d 1347, 1369-1370 (4th Cir.), on reh'g, 602 F.2d 653 (1979), cert. denied, 445 U.S. 961 (1980) (noting that if opinion is based on admissible evidence, such as statements of agents, then it should be admitted). Accordingly, the district court did not abuse its discretion in admitting Jones's testimony.[7]

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[7] Petitioners also suggest (Gill Pet. 13-14; Bruno Pet. 29) that Jones's testimony, as well as that of other former employees, was unduly speculative. But since petitioners systematically destroyed their business records, the government was forced to rely on that testimony to reconstruct petitioners' income. Moreover, the trial court excluded evidence that was speculative—*i.e.*, where a witness did not have a sound basis for testifying as to the amount of business generated at a particular parlor (see S.A. 211-213, 219-222). Additionally, the trial court permitted testimony only as to the minimum amount of receipts generated at the massage parlors

4. Finally, petitioners (Gill Pet. 17-21; Bruno Pet. 12-15) challenge the legality of the search by Pittsburgh police officers of Gill's home and the subsequent transfer of material obtained during that search to officers of the federal government. As the court of appeals correctly found (Pet. App. A5), however, the magistrate had probable cause to issue the search warrant, the search did not exceed the scope of the warrant, and the materials were properly transferred to federal officials.

The record established that after several employees of one of petitioners' massage parlors (Escort Plus) offered to perform acts of prostitution for Pittsburgh Police Detective James Toler, Toler obtained a search warrant for Escort Plus's office in the Union Trust Building (II J.A. 395a-400a). In executing that warrant, Toler found no pertinent business records, but he did find numerous documents that listed Gill's phone number and home address (II J.A. 401a-442a). Furthermore, based on an examination of the lease for Escort Plus, Toler discovered that the lease, although in another person's name, listed Gill's address and phone number (*id.* at 441a-442a). Based on this and other information, Toler applied for and obtained a search warrant for Gill's residence authorizing the seizure of all records, books, codes, lists,

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(*id.* 135). That testimony established that the amount of income generated by the parlors far exceeded the amount reported on the corporate tax returns, even if the figures were inaccurate to some degree. See generally *United States* v. *Wilson*, 601 F.2d 95, 99 (3d Cir. 1979) (noting that under 26 U.S.C. 7206, the government need not prove exact amounts of unreported income but only that a substantial amount of income was not reported). Finally, the district court instructed the jury that it was free to accept or reject the government's calculations as it saw fit (S.A. 346-348).

names of customers, and other paraphernalia used by Escorts Plus (I J.A. 58a).

Members of the Pittsburgh Police Department executed the search. Although an IRS special agent was present during the search, he did not take part in it (II J.A. 414a, 459a-460a). In executing the warrant, Toler observed and seized records pertaining to Escorts Plus as well as various other massage parlors which, from his past experience, he knew to be engaged in prostitution activities (II J.A. 406a-411a, 424a-425a, 427a-429a, 439a, 467a). The following day, pursuant to a subpoena, the records were turned over to a federal grand jury (II J.A. 432a-436a).

In denying petitioners' motion to suppress, the district court correctly found that the warrant was supported by probable cause. Toler's personal knowledge that prostitution activities were being conducted on the premises of Escorts Plus, the fact that the lease for Escorts Plus listed Gill's address and phone number, and Toler's discovery of numerous documents containing Gill's address and phone number all supported the finding of the district court—upheld by the court of appeals—that there was probable cause to search Gill's home.[8] And the district court specifi-

[8] Even assuming that the search was not supported by probable cause, the district court properly found (III J.A. 749a) that suppression would still be inappropriate because of the good faith exception to the exclusionary rule (see *United States* v. *Leon*, 468 U.S. 897 (1984); *Massachusetts* v. *Sheppard*, 468 U.S. 981 (1984)), since the search was conducted pursuant to a warrant and the officers had a good faith basis to believe that the warrant authorized the search they conducted. And Toler's seizure of documents relating to massage parlors other than Escorts Plus was justified under the plain view doctrine (see generally *Texas* v. *Brown*, 460 U.S. 730 (1983)). In this regard, Toler testified that at the

cally found (III J.A. 676a) that the officer seizing the records believed that they were all evidence of the state crimes of prostitution and conspiracy. Since the search was conducted pursuant to a valid warrant, it was not improper for state officials to turn over the material they had seized to federal officials, in response to a grand jury subpoena, for use in petitioners' trial. Cf. *Elkins* v. *United States*, 364 U.S. 206 (1960) (holding that where state officials conduct a search that would have been illegal if conducted by federal officials, evidence obtained during that search is inadmissible in a federal criminal trial).[9]

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time he seized the records of the other massage parlors (records that were intermingled with those of Escorts Plus), he was aware that the other massage parlors were also houses of prostitution (II J.A. 405a, 446a).

[9] Petitioner Bruno also argues (Pet. 19) that documents seized during the course of a fire investigation of one of the massage parlors should have been suppressed. As an initial matter, petitioners did not move to suppress that evidence prior to trial. Since they have not shown good cause for failing to do so, they have waived any objection as to the admissibility of that evidence. See, *e.g.*, *United States* v. *Wertz*, 625 F.2d 1128, 1132 (4th Cir.), cert. denied, 449 U.S. 904 (1980). In any event, Bruno has not shown that the warrantless search of the burned premises, where three people perished, and the seizure of various documents found there during an investigation of the fire, was improper. See generally *Michigan* v. *Tyler*, 436 U.S. 499, 509-510 (1978).

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1986

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